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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY,

Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURE OF THE STATE OF NORTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

In the event of the insolvency and subsequent court-supervised rehabilitation of an insurance company under the insurance statutes of its state of domicile, are the courts of the various states required by the full faith and credit clause of the United States Constitution to follow the prior decisions of the rehabilitation court even if those decisions affect the rights of citizens of other states against the insurer.

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the North Carolina state court.

The petitioner, Underwriters National Assurance Company, an Indiana insurance company, currently has no parent companies, subsidiaries or affiliates. However, prior to the petitioner's rehabilitation in 1977 when the petitioner's stock was placed in a voting trust, all of the petitioner's stock was owned by UNAC International Corporation, an Indiana general business corporation.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner ("UNAC") respectfully petitions the Court to issue a writ of certiorari to the Supreme Court of North Carolina to review the judgment entered by that court on December 4, 1980, affirming an earlier decision by the North Carolina Court of Appeals adverse to UNAC and in favor of the respondents, the North Carolina Life and Accident and Health Insurance Guaranty Association ("North Carolina Guaranty Association") and the Insurance Commissioner and Treasurer of North Carolina.

REPORTS OF OPINIONS BELOW

The December 4, 1980, judgment of the Supreme Court of North Carolina (Appendix A, pp. 1A to 2A) is not reported. The September 2, 1980, opinion of the North Carolina Court of Appeals (Appendix B, pp. 5A to 16A) is reported at 48 N.C. App. 508, 269 S.E.2d 688 (1980). The April 11, 1979, order of the North Carolina trial court (Appendix C, pp. 19A to 28A) is not reported. The November 22, 1978, Order of the Indiana trial court in a related case (Appendix D, pp. 31A to 38A) now on appeal by the North Carolina Guaranty Association to the Court of Appeals of Indiana is not reported.

JURISDICTION OF THE SUPREME COURT

The judgment of the North Carolina Supreme Court was entered on December 4, 1980 (App. 1A).[1] This petition for certiorari is being filed within 90 days of the entry of that judgment. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV, Section 1, United States Constitution:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article I, Section 8, Clause 3, United States Constitution:

"The Congress shall have Power * * *;

"To regulate Commerce * * * among the several States, * * *;"

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[1] Subsequent references to the Appendices attached hereto will be made by "App." followed by the page number.

28 U.S.C. § 1738:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

Set forth in Appendix E are the relevant portions of the insurance laws of Indiana and North Carolina. Those include: Ind. Code §§ 27-1-4-1, 27-1-4-2, 27-1-4-9 and 27-1-4-10 (now repealed)[2] dealing with rehabilitation of insolvent insurers; and N.C. Gen. Stat. § 58-155.69(6), which is part of the statute pursuant to which the North Carolina Guaranty Association was created.

STATEMENT OF THE CASE

This case turns on whether the judgments of the Indiana state courts resuscitating UNAC from its previous insolvency are binding on North Carolina policyholders

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[2] The old rehabilitation, liquidation and conservation chapter of the Indiana Insurance Law of which the cited sections were a part, was repealed by the 1979 Indiana General Assembly, Public Law 255, and was replaced by the new Ind. Code §§ 27-9-1-1 *et seq.*, effective September 1, 1979. The UNAC rehabilitation proceeding was governed by the old statute, which in these respects is not significantly different from the new statute.

and the North Carolina Guaranty Association. UNAC is an Indiana stock insurance company. In 1973, it was licensed to do business in 45 states, including North Carolina. In 1973 UNAC had deposited a bond in the face amount of $100,000 for the benefit of North Carolina policyholders with the North Carolina Treasurer in order to maintain its license with the North Carolina Commissioner of Insurance. The bond has remained in North Carolina ever since.

Respondent North Carolina Guaranty Association is a creature of North Carolina statute. In substance, a guaranty association—a relatively recent development in most states—is a mechanism whereby all insurance companies doing business in a given state become ultimately responsible to fulfill policy obligations of any of them who becomes insolvent or otherwise fails to honor its policies. UNAC's rehabilitation reduced UNAC's liabilities on its policies as originally written. As a result, the North Carolina Guaranty Association became contingently liable to complete those obligations to North Carolina policyholders.

The Indiana Rehabilitation Proceeding (1974-1977). On August 5, 1974, at the request of the Indiana Department of Insurance pursuant to the Indiana Insurance Law,[3] UNAC became the subject of an Order of Rehabilitation in a statutory rehabilitation proceeding in an Indiana state court ("Indiana Rehabilitation Court"). In oversimplified terms, UNAC's reserves were believed inadequate to meet its future policy obligations. The Indiana Insurance Commissioner was appointed statutory Rehabilitator by the Court. From August 5, 1974, until February 4, 1977, when UNAC was released from rehabilitation, the Rehabilitator had legal possession of the assets of UNAC and was responsible for UNAC's insurance business including the administration of UNAC's over 50,000

[3] Ind. Code §§ 27-1-4-1 and 2 (App. 42A-44A).

outstanding policies scattered around the United States and several foreign countries.

Under Indiana Insurance Law,[4] the Rehabilitator also had the obligation to take steps, with Court approval, toward the removal of the causes for the rehabilitation proceeding. That general mandate to the Commissioner is found in the insurance insolvency statutes of virtually all states. Work commenced on a "Plan of Rehabilitation"—in substance, a restructuring of UNAC's liabilities very similar to a reorganization of a general business corporation under federal bankruptcy laws. Ultimately, a Plan was entered as a judgment of the Indiana Rehabilitation Court. The release of UNAC from rehabilitation took place on February 4, 1977.

All interested persons were given notice of the rehabilitation proceeding and many intervened as parties to the proceeding. In particular, among many others, the North Carolina Guaranty Association intervened and—with other affected state guaranty associations[5]—negotiated the terms of the Plan that related to guaranty associations.[6] Other interests appeared as named parties or by representative parties (classes of policyholders and

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[4] Ind. Code § 27-1-4-2(a) (App. 43A).

[5] Only eight state guaranty associations were involved with UNAC. Several states had no guaranty association at the time. Other state guaranty associations were not involved because the particular types of insurance UNAC wrote—principally professional disability insurance—were not subject to their guaranty association laws.

[6] The North Carolina Guaranty Association had been notified by the North Carolina Insurance Commissioner of the UNAC rehabilitation proceeding on August 6, 1974—within 24 hours after the proceeding started. From time to time thereafter, the North Carolina Insurance Commissioner communicated with the North Carolina Guaranty Association about the UNAC rehabilitation proceeding, as provided by the North Carolina statute which created the North Carolina Guaranty Association.

shareholders) and several objections were filed. The policyholders as a class[7] participated actively in the rehabilitation process and the hearings before the Indiana Rehabilitation Court.

After extensive negotiations, provisions in the Plan were agreed to by the guaranty associations and the Rehabilitator and were incorporated in a proposed plan tentatively approved by the Indiana Rehabilitation Court on July 19, 1976, after a hearing at which the North Carolina Guaranty Association was present and participated. In August 1976, the Rehabilitator mailed detailed information about the status of the rehabilitation proceeding to all parties, including the North Carolina Guaranty Association, the North Carolina Insurance Commissioner and all policyholders. The mailing to the parties included (a) a detailed notice of a final hearing scheduled for October 14, 1976, (b) a copy of a tentative rehabilitation plan for UNAC, and (c) in the case of policyholders, a data sheet describing the policyholder's policy and the amounts the policyholder would receive under the tentative plan.

On October 12, 1976, the North Carolina Guaranty Association and the seven other guaranty associations filed

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[7] The Indiana rehabilitation statute, which predates federal and state class action rules, contemplates that policyholders may be parties by representation apart from the rules of civil procedure. In addition, current Indiana Trial Rule 23 is a mirror of Federal Rule 23. After the Indiana Rehabilitation Court entered its policyholder class certification order under Rule 23 on October 30, 1975, the first of many notices was sent to all 50,000 UNAC policyholders on December 10, 1975. There were no policyholder subclasses and no geographic restrictions upon the class's representation by counsel. The class consisted of "all persons who are or have at any time been holders of contracts of insurance" with UNAC. All North Carolina policyholders were class members and, therefore, parties under Trial Rule 23. None "opted out." No policyholder objected to the classifications or requested subclasses to be established.

a pleading entitled "Information to the Court and Petition for Approval of Mailing to Certain Policyholders of UNAC and Approval of Concept of Service Contract Between Guaranty Associations and UNAC." The guaranty associations asked the Indiana Rehabilitation Court to approve a form letter to policyholders in the eight guaranty association states and to approve the concept of a service contract between UNAC and each of the guaranty associations. The contract would provide for UNAC to continue to administer the insurance policies as to which the guaranty associations had obligations. The guaranty associations' request was granted by the Indiana Rehabilitation Court.

After a hearing on October 14, 1976, at which the North Carolina Guaranty Association was present and participated, the Indiana Rehabilitation Court issued its Final Judgment, which included a final Plan of Rehabilitation ("Plan"), on November 22, 1976. Substantial changes were mandated in UNAC's contractual relationships with its policyholders, agents and creditors, as well as in UNAC's management structure. Policyholders were given the option of receiving the liquidated value of their policies or continuing their policies with UNAC on a reduced benefit-increased cost basis. One provision of the Plan dealt specifically with the eight guaranty associations involved. The Final Judgment, among many other items (a) expressly found that the court had jurisdiction over all policyholders and their representative guaranty associations, (b) compromised all policyholders' claims against UNAC whether or not the policyholder was a member of a Rule 23 certified class (as all North Carolina policyholders were), and (c) provided that after the specified Court-directed changes in the obligations between UNAC and each of the guaranty associations, "UNAC shall have no further obligation or liability to any guaranty association." No appeal was taken from the Indiana Rehabilitation Court's 1976 Final Judgment.

UNAC has now implemented the Plan in all states of the United States and in Canada and has resumed possession of its property and the conduct of its business as a privately operated Indiana stock insurance company. UNAC is not (and was not at any time after February 4, 1977, when the rehabilitation proceeding terminated) in default of any policyholder contracts as those contracts were revised by the Indiana Rehabilitation Court.

The Guaranty Association's Post-Rehabilitation Petition (June 1977). On June 8, 1977, UNAC and the eight guaranty associations filed a "Petition for Instructions Concerning a Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations." By their joint petition, UNAC and the guaranty associations—including the North Carolina Guaranty Association—asked the Indiana Rehabilitation Court for permission to execute a Service Contract in the form attached to the petition. On June 14, 1977, the Indiana Rehabilitation Court directed UNAC and each of the guaranty associations to do all acts reasonably necessary or appropriate to implement and carry out the form Service Contract. Basically, the Service Contract provided for UNAC to continue to administer the insurance policies of policyholders residing in guaranty association states, with the guaranty associations paying UNAC a service fee for doing so. The guaranty associations (rather than the policyholders) were to pay UNAC any future premium increases (prior to rehabilitation, UNAC's policies did not permit such increases). The guaranty associations were to pay directly to policyholders any policy benefits which were cancelled by the Plan.

The North Carolina Suit (January 1978). The other seven guaranty associations abided by the Indiana Rehabilitation Court's Order of June 14, 1977. The North Carolina Guaranty Association first attempted to change the prescribed form of Service Contract (which it had petitioned the Indiana Rehabilitation Court to approve) by

adding a new paragraph about the North Carolina deposit on the last page. That effort was not agreed to by UNAC and was subsequently held void by the Indiana Rehabilitation Court. In December 1977, UNAC expressed its view that the Indiana Rehabilitation Court's Final Judgment had already adjudicated the North Carolina Guaranty Association's rights or lack of rights in the deposit. The North Carolina Guaranty Association then filed this case in January of 1978 in a North Carolina state court naming UNAC and the North Carolina Insurance Commissioner and Treasurer as defendants. The complaint sought to obtain for the benefit of the North Carolina Guaranty Association, as claimed assignee of the rights of North Carolina policyholders, the $100,000 deposit made by UNAC in North Carolina in 1973. The North Carolina Insurance Commissioner and Treasurer, though nominal defendants in the lawsuit, filed a cross-claim against UNAC seeking the same sort of relief requested by the North Carolina Guaranty Association.

The Indiana Petition for Instructions (July 1978). After the North Carolina lawsuit was filed, UNAC was faced with the prospect of having to make payments to the North Carolina Guaranty Association out of the treasury of UNAC under the Service Contract, at the same time that the North Carolina Guaranty Association was, in UNAC's view, ignoring the orders of the Indiana Rehabilitation Court and the rights of policyholders outside North Carolina.[8] UNAC filed a Petition for Instructions with the

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[8] The $100,000 deposit was included in the general assets of UNAC under Part V of the Plan. As a result, the deposit is held for the benefit of all policyholders unless and until there is a post-rehabilitation default by UNAC. No party—including the North Carolina Guaranty Association itself—made *any* objection to Part V of the Plan or suggested *any* changes. And, one of the hallmarks of the Plan was that, absent objections, all policyholders everywhere were to be treated equally so that UNAC could be successfully rehabilitated.

Indiana Rehabilitation Court on July 13, 1978. After notice to all affected parties, a hearing was held on September 20, 1978, before the Indiana Rehabilitation Court. Both the North Carolina Guaranty Association and UNAC appeared.

On November 22, 1978, an Order (App. 31A, 38A) was entered providing, *inter alia*:

> "2. The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.
>
> "3. The insertion by the North Carolina Association of the last paragraph on page 8 of the Service Contract was not authorized by the Court and is a violation of the Court's Order of June 14, 1977. * * *
>
> "4. The claims asserted in the North Carolina lawsuit commenced by the North Carolina Association against Underwriters would result in a violation of the orders of this Court. * * *"

That Order has been appealed by the North Carolina Guaranty Association to the Court of Appeals of Indiana. The case is fully briefed, but no appellate decision has as yet been rendered.

Proceedings in the North Carolina Courts. After the Indiana Rehabilitation Court had thus spoken a second time on the subject of UNAC's North Carolina deposit, the North Carolina Guaranty Association, and the North Carolina Insurance Commissioner and Treasurer joined in a motion for summary judgment in the North Carolina

state court action. UNAC filed a cross motion for summary judgment. Affidavits and briefs were submitted by both sides and a hearing was held in the North Carolina state court on March 19, 1979. UNAC raised its res judicata and full faith and credit defenses in its answer to the North Carolina complaint and cross-claim, and also affirmatively asserted those defenses in support of its motion for summary judgment.

On April 11, 1979, the North Carolina trial court entered summary judgment for the North Carolina Guaranty Association (App. 19A). That order held that despite the contrary rulings of the Indiana Rehabilitation Court in 1976 and 1978, UNAC's North Carolina deposit could be applied to meet pre-rehabilitation obligations owed by UNAC to North Carolina policyholders.

UNAC appealed to the North Carolina Court of Appeals, raising again its constitutional and statutory defenses. In an opinion dated September 2, 1980 (App. 5A), the Court of Appeals affirmed the decision of the North Carolina trial court, saying in the crucial paragraph (App. 15A) that the Indiana Rehabilitation Court did not have the necessary personal jurisdiction over the North Carolina Insurance Commissioner and Treasurer, and that since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding.

On October 6, 1980, UNAC timely filed a Notice of Appeal and Alternative Petition for Discretionary Review in the Supreme Court of North Carolina, raising again its constitutional and statutory defenses, as well as pointing out the interstate commerce implications of the Court of Appeals' interpretation of North Carolina law. By judgment entered on December 4, 1980 (App. 1A), the Supreme Court let the opinion of the North Carolina Court of Appeals stand.

REASONS FOR GRANTING THE WRIT

The Decision Of The North Carolina Courts Conflicts With The Decision Of This Court In Pacific Mutual And Other Applicable Full Faith And Credit And Commerce Clause Decisions On An Important Point.

This is a classic case for the exercise of this Court's role as "umpire" of the federal system. The decisions of the North Carolina courts require this Court's review because they conflict with the decisions of the Court implementing the full faith and credit clause as well as with the plain language of that clause. And even if there were no such conflict, the case presents an issue of major importance—whether the decisions of the domiciliary state of an impaired insurer are to be given nationwide effect.

There is no federal law governing insurers' delinquency proceedings. The Bankruptcy Code expressly does not apply to insurance companies (11 U.S.C. § 109(b)), and there is no other federal statutory law dealing with the problems of insolvent or otherwise delinquent insurers. Therefore, it is entirely up to the states to handle the problems of rehabilitation and liquidation of insurance companies. It is obvious, however, that the adjustment of rights as between citizens of states with differing laws of property and creditors' rights is just as important with respect to insolvent insurance companies notwithstanding the states' historical role in regulation of insurance. And the solution of these problems, absent federal legislation, requires the utmost degree of interstate cooperation and the deference to the regulatory laws of the domiciliary state of the insurance company. Those principles have been recognized by this Court throughout the twentieth century.

It is indisputable that a plan of rehabilitation adopted by one state court can constitutionally alter the pre-rehabilitation obligations of the multi-state insurer to policyholders, shareholders, agents, and others, as long as

each is given the option (as was done here) to elect to take a liquidation value instead of continuing with the rehabilitated company. The most comprehensive authority on the subject of the alteration of pre-rehabilitation rights comes from the various court decisions concerning the rehabilitation of the Pacific Mutual Life Insurance Company of California in the late 1930's. Opinions in three cases (one each in North Carolina, Illinois and Wisconsin),[9] repulsed collateral attacks on the California rehabilitation. However, the California Supreme Court decision in *Carpenter v. Pacific Mut. Life Ins. Co. of Cal.*, 10 Cal.2d 307, 74 P.2d 761 (1937), and its affirmance in this Court in *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170 (1938), remain today the landmark decisions in the rehabilitation area and the guiding light for insurance regulators. The Pacific Mutual doctrine clearly establishes that a plan of rehabilitation, such as that adopted for UNAC, constitutionally and effectively compromises and adjusts all pre-rehabilitation rights, even though all persons with such rights are not made parties to the rehabilitation proceeding except by representation.[10]

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[9] *Taylor v. Pacific Mut. Life Ins. Co. of Cal.*, 214 N.C. 770, 200 S.E. 882 (1939); *Larson v. Pacific Mut. Life Ins. Co. of Cal.*, 373 Ill. 614, 27 N.E.2d 458, *cert. denied*, 311 U.S. 698, 61 S.Ct. 137 (1940); and *Padway v. Pacific Mut. Life Ins. Co. of Cal.*, 42 F.Supp. 569 (E.D. Wis. 1942).

[10] Just as the policyholders in the Pacific Mutual rehabilitation were forced to accept an alteration of their contract rights, shareholders of an insolvent insurance company have been forced to accept a complete nullification of their equity interest in the company. *In re American Investors Assurance Co.*, 521 P.2d 560 (Utah 1974). Agents have likewise had their relationship with troubled insurance companies changed by courtapproved plans of rehabilitation. *People v. Peoria Life Ins. Co.*, 376 Ill. 517, 34 N.E.2d 829, *cert. denied*, 314 U.S. 688, 62 S.Ct. 300 (1941); and *Liberty Nat'l Ins. Co. v. Reinsurance Agency, Inc.*, 307 F.2d 164 (9th Cir. 1962). *See also, National Surety Corp. v. Nantz*, 262 Ky. 413, 90 S.W.2d 385 (1936); *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, 1311 (1977); *Hutchins v. Pacific Mut. Life Ins. Co. of Cal.*, 97 F.2d 58 (9th Cir. 1938); *Morris v. Investment Life Ins. Co. of America*, (1965) 1 Ohio App.2d 330, 204 N.E.2d 550 (1965); and *Neblett v. Pacific Mut. Life Ins. Co. of Cal.*, 22 Cal.2d 393, 139 P.2d 934 (1943), *cert. denied*, 320 U.S. 802, 64 S.Ct. 428 (1944).

Equally without dispute is that each state must give full faith and credit to proceedings under another state's statutes similar to the statutory insolvency proceeding in Indiana to which UNAC was subject. And federal and state courts and officers must defer to domiciliary state dissolution proceedings and the rights of statutorily-appointed insolvency receiver in the insolvent company's home state. *See Relfe v. Rundle*, 103 U.S. 222 (1880); *Converse v. Hamilton*, 224 U.S. 243, 32 S.Ct. 415 (1912); *Broderick v. Rosner*, 294 U.S. 629, 55 S.Ct. 589 (1935); *Clark v. Willard*, 292 U.S. 112, 54 S.Ct. 615 (1934); *Commonwealth Of Pennsylvania v. Williams*, 294 U.S. 176, 55 S.Ct. 380 (1935); *Gordon v. Ominsky*, 294 U.S. 186, 55 S.Ct. 391 (1935); and *Penn Gen. Cas. Co. v. Commonwealth*, 294 U.S. 189, 55 S.Ct. 386 (1935). *In accord, Genecov v. Wine*, 109 F.2d 265 (8th Cir. 1940); and *American Cast Iron Pipe Co. v. Statesman Ins. Co.*, 343 F.Supp. 860 (D. Minn. 1972).

All potential claimants were given notice of the UNAC Plan and an opportunity to be heard. Until the Indiana Rehabilitation Court resolved the matter, the remedies available to North Carolina policyholders or any other creditor under state laws could be asserted. In particular, the North Carolina deposit could have been subjected to attachment or other process in North Carolina *before* UNAC was released from rehabilitation. That is what the *Gold* decision upon which the North Carolina courts rely stands for (App. 15A). If that had been done, then the Indiana Rehabilitation Court could have taken that action into account in making special provisions for North Carolina policyholders—in effect setting off their special North Carolina law benefits. But no such effort was instituted in the State of North Carolina or anywhere else. To the contrary, North Carolina policyholders and the North Carolina Guaranty Association elected to

participate in the rehabilitation Plan on the same basis as everyone else.[11]

But once reduced to judgment, the Indiana Rehabilitation Court's Final Judgment and Plan settled all pre-rehabilitation claims. And once the rehabilitation process was concluded and a Plan was approved in accordance with the procedures established by the Indiana Rehabilitation Court's orders under Indiana law, the rehabilitated UNAC was entitled to start its business with a clean slate, unencumbered by the threat of successful future lawsuits based on past wrongs.

The North Carolina Guaranty Association's 1978 complaint against UNAC and the cross-claims of the North Carolina Commissioner and the North Carolina Treasurer represent an effort to do just what common sense and the overwhelming legal precedents just cited prohibit: resurrect pre-rehabilitation claims in a court other than the Indiana Rehabilitation Court.

Despite the North Carolina Court of Appeals' recognition (App. 13A) in its opinion that "pre-rehabilitation

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[11] There are a number of reasons why a party with an interest in the North Carolina deposit might choose to give up that interest and participate instead in the rehabilitation in Indiana. First, the cost of administering a separate rehabilitation or liquidation in North Carolina would be substantial. That fact led the Canadian authorities to go along with the Plan, even though UNAC had a disproportionately large amount of assets on deposit in Canada and Canadian policyholders would have fared better than U.S. policyholders in a liquidation. Second, the Plan gave policyholders (and the North Carolina Guaranty Association as their assignee) certain contingent rights to recoup their losses.

Those included an initial cash distribution, a share of a $2.5 million limited RPR benifet, a share in any third-party litigation recoveries, and, for the eight guaranty associations, a share of future profits. Finally, the Plan offered policyholders the assurance of uninterrupted insurance coverage with UNAC. Whether the $100,000 in North Carolina could economically be run as a separate mini-insurance company insuring the approximately 30 policyholders in that state is problematic at best.

contractual rights" can be modified by a plan of rehabilitation and that pre-rehabilitation claims against the rehabilitated company's "general assets" cannot be tolerated, the decision nevertheless goes on to draw a distinction concerning "statutory rights" and "special deposits." But the Indiana court treated all assets—including the North Carolina deposit—as "general assets." The time and place to challenge that decision was (a) in Indiana, and (b) before the judgment was implemented.

That distinction, which is the only stated justification for the action of the North Carolina courts in ignoring the 1976 and 1978 judgments of the Indiana Rehabilitation Court, is contained in the following single paragraph on the last two pages of the opinion (App. 15A):

> "It is undisputed that the deposit made by UNAC is located in North Carolina and is held in trust. It is the manifest intention of the North Carolina Legislature that the *title* and *rights* to securities deposited in accord with Article 20, Chapter 58-188.5 *et seq.* are vested in the Commissioner of Insurance, the Treasurer and the State. Continental Bank and Trust Co. v. Gold, 140 F.Supp. 252 (E.D.N.C. 1956). The Indiana Court did not have the necessary personal jurisdiction over the Commissioner of Insurance and the Treasurer. Since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding. Thus, neither the trust property nor the Commissioner and Treasurer were subject to the judicial jurisdiction of the Court in Indiana. Because the Indiana court lacked jurisdiction of the subject matter and in personam jurisdiction to determine the statutory rights of the North Carolina policyholders in the deposit made by UNAC, the Indiana Court's decision is not entitled to full faith and credit in North Carolina and is not protected by the doctrine of *res judicata*."

Those two ideas—that the deposit was not physically (and thus jurisdictionally) in Indiana and that the North Carolina Insurance Commissioner and Treasurer were not parties to the Indiana rehabilitation proceeding—form the purported legal foundation for the North Carolina Court of Appeals' conclusion that what the Indiana Rehabilitation Court said and did was not binding so far as policyholder rights in the North Carolina deposit were concerned because the Indiana Rehabilitation Court lacked "jurisdiction."

This "jurisdictional" construct is defective as a matter of federal constitutional law. First, every Indiana insurance company upon qualifying to do business in a state, carries into that state the rehabilitation provisions of Indiana law, Ind. Code §§ 27-1-4-1, -2, -9 and -10 which, among other things, permit the courts of Indiana to restructure claims against the company. That has been the law for over 100 years. As this Court said in *Relfe v. Rundle*, 103 U.S. 222, 226 (1880):

> "* * * Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

In accord, Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 67 S.Ct. 1355 (1947). In short, North Carolina was required to give full faith and credit to the rehabilitation statute of the state of UNAC's incorporation.

In *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242 (1963), this Court discussed in some detail these res judicata and full faith and credit principles in the context of a two-state dispute over the ownership of land. Mr. Justice Stewart

pointed out that a judgment of a court in one state is constitutionally binding in the second state provided the court in the first state had the jurisdiction to render the judgment. 375 U.S. at 110, 84 S.Ct. at 244. The Court then said:

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that *a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.*"

375 U.S. at 111, 84 S.Ct. at 245. (Emphasis added.)

Under *Durfee*, the North Carolina trial court in 1979 was required to follow the 1978 judgment of the Indiana Rehabilitation Court that any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Guaranty Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the Final Judgment and the Plan. That judgment was entered after the North Carolina Guaranty Association's jurisdictional defenses had been "fully and fairly" litigated in the Indiana Rehabilitation Court on UNAC's 1978 Petition for Instructions.

More importantly, the rights of those beneficially interested in the deposit in North Carolina—North Carolina policyholders and the North Carolina Guaranty Association—were fully adjudicated in Indiana in *1976*. That determination is entitled to res judicata effect in North Carolina. The only "statutory" right under the North

Carolina deposit statute is a right in the event of a contract breach by the insurer. By reason of the Indiana rehabilitation proceeding and the Final Judgment of the Indiana Rehabilitation Court, after UNAC was released from rehabilitation *there was and is no policyholder in North Carolina who had or has any contract breach claim.* All pre-1976 claims were compromised in 1976 by Indiana court action. The North Carolina Insurance Commissioner and Treasurer are plainly mere stakeholders or escrow agents; they are in no sense owners of beneficial interests in a deposit which was held for policyholders only. The beneficial rights in the deposit were adjudicated in Indiana and that judgment must be given full faith and credit, even though the deposit physically stayed in North Carolina. The "res" does not have to be in the jurisdiction for the jurisdiction's judgments to be entitled to constitutional protection. This Court so held in *Riehle v. Margolies*, 279 U.S. 218, 49 S.Ct. 310 (1929), and *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 858, *reh. den.*, 330 U.S. 854, 67 S.Ct. 858 (1947). *In accord, Continental Bank and Trust Co. v. Apodaca*, 239 F.2d 295 (10th Cir. 1956).

Because of the 1976 decision of the Indiana Rehabilitation Court, UNAC is not currently in default of any contractual obligation to policyholders in North Carolina or anyplace else. The only way for North Carolina to say that UNAC today is an "impaired insurer" under its statute, N.C. Gen. Stat. § 58-155.69(6) (App. 45A), is to ignore the Final Judgment of the Indiana Rehabilitation Court. That Final Judgment took UNAC out from under the 1974 Order of Rehabilitation and made UNAC no longer subject to it. That Judgment dealt with the problems that brought about the need for a long and difficult rehabilitation proceeding in Indiana, and as such, it is res judicata. The North Carolina Guaranty Association had no right to use a North Carolina statute to take the $100,000 deposit from a solvent company. UNAC has implemented the Plan and is no longer insolvent. UNAC is not in default

of its insurance contracts with North Carolina policyholders or any other policyholders, as those policies were restructured by the Plan. The Plan has been approved, with the North Carolina Guaranty Association participating actively, and the orders of the Rehabilitation Court are now res judicata against the North Carolina Guaranty Association and the policyholders through whom it seeks to assert a claim. The only way to reach a contrary result is to ignore Indiana law.

Finally, it goes without saying that for a variety of constitutional and practical reasons, the Insurance Commissioner and Treasurer of a sister state almost certainly could not be made parties to a rehabilitation proceeding in the state of domicile.[12] Any interpretation of North Carolina law that has the effect of suggesting that the Insurance Commissioner or Treasurer has substantive rights in UNAC's North Carolina deposit that cannot be adjudicated somewhere else is not only a violation of the constitutionally required full faith and credit that must be given to the Indiana law and the judgments of the Indiana Rehabilitation Court; it is also an unconstitutional burden upon interstate commerce. The North Carolina Court of Appeals for the first time announced its novel and unprecedented views as to the purported jurisdictional

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[12] The Court's recent opinion in *Leroy v. Great Western United Corp.*, 443 U.S. 173, 99 S.Ct. 2710 (1979), did not have to reach the constitutional question raised by the assertion of personal jurisdiction by the trial court in one state (Texas) over government officials responsible for enforcement of the state takeover statute in a second state (Idaho). However, the Court's opinion in *Kulko v. Superior Court*, 436 U.S. 84, 98 S.Ct. 1690 (1978), and the Court's other personal jurisdiction decisions since *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945), cast considerable doubt on the constitutionality of an attempt by a court in one state to subject to suit in that state the nonresident state officials of a second state acting in their governmental capacity. *See also Turner v. Baxley*, 354 F.Supp. 963 (D. Vt. 1972), and *Idaho Potato Commission v. Washington Potato Commission*, 410 F.Supp. 171 (D. Idaho 1976).

deficiency of the Indiana Rehabilitation Court, because of the absence from Indiana of the North Carolina deposit and the North Carolina state officers. But this doctrine, if valid, renders impossible the rehabilitation of a multi-state insurer. Moreover, it is clear on the face of the North Carolina statute that the policyholders were the only persons who ever had any legitimate claims to the deposit. And it is equally clear that the North Carolina Insurance Commissioner was given notice of—if not made a party to—the rehabilitation proceeding from its inception. By twisting North Carolina law, the courts of that State have put an unconstitutional barrier in the conduct of interstate insurance by companies with assets and liabilities in many states. *Cf.* Horowitz, *The Commerce Clause As A Limitation On State Choice-Of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971). That barrier can only be eliminated by this Court's issuance of a writ of certiorari.

CONCLUSION

For the above reasons, the Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of North Carolina affirming the decision of the Court of Appeals of North Carolina.

Respectfully submitted,

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Counsel for the Petitioner

Appendices

APPENDIX A

No. 60PC TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1980

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NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION	)	
v	)	
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA and HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA	)	JUDGMENT DISMISSING APPEAL ON MOTION OF PLAINTIFF AND DENYING PETITION FOR DISCRETIONARY REVIEW
	)	(7910SC76)

****

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G. S. 7A-30, upon plaintiff's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G. S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 2nd day of December 1980 that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that Defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Carlton, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this *4th* day of *December, 1980.*

s/ John R. Morgan
John R. Morgan
Clerk of the Supreme Court of
North Carolina

cc: North Carolina Court of Appeals
Allen, Steed & Allen, Attorneys at Law
Purrington & Purrington, Attorneys at Law
Baker & Daniels, Attorneys at Law
Richard L. Griffin, Assistant Attorney General

APPENDIX B

NO. 7910SC766

NORTH CAROLINA COURT OF APPEALS

Filed: 2 September 1980

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION	)	
v.	)	Wake County No. 78CVS174
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA and HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA	)	

Appeal by defendant Underwriters National Assurance Company from Bailey, Judge. Judgment entered 11 April 1979 in Superior Court, Wake County. Heard in the Court of Appeals 29 February 1980.

On 12 January 1978 plaintiff (hereinafter Guaranty Association) filed a complaint against defendant, an insurance company domiciled in Indiana (hereinafter UNAC) seeking a judgment declaring the Guaranty Association's right to have a deposit, made by UNAC, applied to meet UNAC's obligations to North Carolina policyholders. The facts leading up to this complaint are as follows: UNAC was qualified to do business and was carrying on the business of selling accident and disability insurance in North Carolina until 4 October 1974, when UNAC voluntarily withdrew from doing business in North Carolina. In June 1973 the North Carolina Insurance Commissioner informed the President and Chairman of the Board of UNAC, that a $100,000 deposit for the protection

of North Carolina policyholders would be required as a condition to allowing UNAC to do business in North Carolina. UNAC made the required $100,000 deposit on 27 September 1973, which was registered as follows: "Treasurer of the State of North Carolina in trust for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina General Statutes." That deposit continues to be held by the North Carolina Insurance Commissioner.

In 1974 the Indiana Department of Insurance concluded that UNAC's reserves were inadequate to meet policy obligations and decided to take action in the Indiana Courts to petition for rehabilitation of UNAC on 5 August 1974.

The Rehabilitator undertook the administration and rehabilitation of UNAC under the supervision of the Superior Court of Marion County, Indiana. As the rehabilitation progressed, the North Carolina Commissioner advised the Guaranty Association of developments bearing upon its obligations to North Carolina policyholders.

On 10 December 1975, notices were mailed to all policyholders, including the policyholders then in North Carolina regarding conditional policyholder class representation or exclusion therefrom. This notice to policyholders provided in part: "Any person so requesting exclusion will not participate in any recovery of the intervening class, and will not be bound by the results of the litigation, insofar as his status as a member of such class is concerned. As a policyholder, however, he may be bound by a judgment effecting policyholders, if any is entered, including any reorganization plan approved by the Court in the rehabilitation proceeding."

On 27 May 1976 the Rehabilitator sent a formal notice to the state insurance guaranty associations and directed their attention to part X(C) of the proposed plan dated 23

April 1976. This notice was also sent to the North Carolina Insurance Commissioner. The last paragraph of part X(C) provided:

> The guaranty associations in some states may have obligations to UNAC policy owners as a result of the UNAC rehabilitation proceeding. Moreover, to the extent such guaranty associations do have obligations, there is a possibility that these guaranty associations may seek to recover from UNAC sums paid to UNAC policy owners. The Rehabilitation Plan should resolve UNAC's contingent liability to any guaranty association by determining that UNAC has no further obligation or liability to any guaranty association.

On 8 June 1976 the Guaranty Association together with other state guaranty associations moved to intervene in the Indiana rehabilitation proceeding in "an effort not only to protect the rights of the Guaranty Associations, but also to accommodate the Petitioner (Rehabilitator) in his efforts to effectuate an orderly and equitable rehabilitation of the Respondent (UNAC)." The Guaranty Association was permitted to intervene in the rehabilitation proceeding and was represented by counsel at a hearing on 9 June 1976 concerning the proposed plan of rehabilitation. At the hearing the Guaranty Association objected to the provisions of the initial plan and made suggested changes. These suggested changes were agreed to by the Rehabilitator and were incorporated into a proposed plan tentatively approved by the rehabilitation court on 19 July 1976.

Subsequently, the intervening guaranty associations asked the rehabilitation court to approve a form letter to policyholders residing in North Carolina and seven other states and to approve in concept a service contract which would provide for UNAC to continue to administer the

insurance policies on which each intervening guaranty association had obligations. The request of the intervening guaranty associations was granted by the rehabilitation court.

On 22 November 1976 the rehabilitation court entered an Order and Memorandum Approving the Plan of Rehabilitation in Settlement of Claims and Litigation. Part of the order provided in part:

> In consideration of the provisions of the Rehabilitation Plan, the claims of the UNAC policy owner class representatives are compromised and dismissed.... Whether or not any policy owner is a member of a class pursuant to Trial Rule 23, in order to fix and determine UNAC's obligations after rehabilitation, all claims of UNAC policy owners against UNAC are compromised and dismissed....

The order of rehabilitation allowed UNAC to increase the guaranty premiums on the noncancellable disability insurance policies. The order of rehabilitation also cancelled obligations owed by UNAC pursuant to the return of premium rider which provided that if no claim was made under the policyholder's basic insurance coverage for a period of ten years, most of the premiums paid during that 10 year period would be returned to the policyholder. The policyholders having return of premium riders were entitled to receive 15.68% of the additional amount paid for the return of premium rider prior to the insolvency date and were entitled to no return on the basic policy premium.

Paragraph 1 of the rehabilitation court's findings of fact in the order approving the final plan of rehabilitation provided: "The Court has jurisdiction over the subject matter and over the parties, including UNAC,...all UNAC policy owners,...State Insurance Guaranty Associations..." In its order, the court stated:

> To the extent that any claim, objection or proposal which was or could have been presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied. Without limiting the generality of the preceding sentence, all claims of litigation by any past or present UNAC policy owners,... against UNAC or the Rehabilitator, except as provided in the Plan, are hereby compromised, settled and dismissed.

On 8 June 1977 the UNAC and the eight intervening guaranty associations filed a joint "Petition for Instructions Concerning a Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations." On 14 June 1977 the rehabilitation court gave its permission to do all acts reasonably necessary or appropriate to implement and carry out an approved Service Contract. UNAC then sent the Guaranty Association the courtapproved Service Contract. The Guaranty Association added the following language to the Service Contract without the approval of the rehabilitation court:

> It is expressly agreed, however, that the Guaranty Association and Underwriters explicitly reserve all their rights and remedies in connection with any deposits made by Underwriters with the Commissioner of Insurance of North Carolina, including deposits understood to total... $100,000, which rights and remedies are governed by North Carolina law.

The Guaranty Association's president signed this altered document on 13 October 1977 and returned it to UNAC. Thereafter the President of UNAC returned the executed Service Contract accompanied by a letter of transmittal. In the letter the President indicated that he understood that

the added paragraph was designed simply to recite that neither the Guaranty Assocation nor UNAC had waived any claims that it may have in connection with the North Carolina deposits. The President then indicated that UNAC took the position that Guaranty Association had no claims to the deposit, since the plan of rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits. After receiving this letter the Guaranty Association filed its complaint in North Carolina for declaratory judgment.

In its answer UNAC alleged that the Indiana Court's rehabilitation order should be given full faith and credit; that the security deposit at issue was an asset of UNAC and subject to the jurisdiction of the rehabilitation court; that the Guaranty Association acknowledged jurisdiction of the rehabilitation court by appearing in said rehabilitation proceedings; and that the rehabilitation order was *res judicata*.

On 13 July 1978 UNAC filed a Petition for Instructions with the Rehabilitation Court concerning the impact of the North Carolina action. After notice and hearing on this petition, an order was entered on 22 November 1978. The Indiana Court concluded:

> The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policy owner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.

The Guaranty Association appealed this Order, and that appeal is still pending.

After the Indiana Court had acted, Guaranty Association, the North Carolina Insurance Commissioner and Treasurer joined in a motion for summary judgment. On 12 March 1979 UNAC also filed a motion for summary judgment. On 11 April 1979 the trial court entered summary judgment for the Guaranty Association.

Allen, Steed and Allen, by William S. Patterson, Charles D. Case and Ann Hogue Pappas for the plaintiff.

Purrington, McNamara & Pipkin, by Ashmead P. Pipkin, for the defendant Underwriters National Assurance Company.

MARTIN (Robert M.), Judge.

The question presented for review is whether plaintiff's motion for summary judgment was properly granted. This is a proper case for a declaratory judgment, G.S. 1-254, and the Guaranty Association is entitled to maintain the action. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E. 2d 35 (1972). The propriety of a summary judgment in such action is governed by the same rules applicable to other actions, G.S. 1A-1, Rule56(a) and (b) and 57. Here, there is no substantial controversy as to the facts disclosed by the evidence and the legal significance of those facts presents the questions in dispute. It was unnecessary for the Guaranty Association to show that it had suffered any loss or had any right impaired in order to maintain the action. Rather, the Association had to show that it would ultimately suffer a loss or have a right impaired. Newman Machine Co. v. Newman, 2 N.C. App. 491, 163 S.E. 2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E. 2d 63 (1969).

The trial court entered an order which found "specified facts without substantial controversy," made conclusions of law and ordered that:

1. The UNAC policyholders residing in North Carolina on August 5, 1974, are entitled to have

the deposit made by UNAC for the sole protection of North Carolina policyholders liquidated and to have the proceeds applied to meet the pre-rehabilitation obligations owed to them by UNAC to the extent those obligations were defaulted upon as a result of the insolvency of UNAC and the subsequent rehabilitation proceeding in Indiana.

2. To the extent that the proceeds of the deposit made by UNAC for the sole benefit of North Carolina policyholders fulfill the contractual obligations owed by UNAC to North Carolina policyholders, the Guaranty Association is not liable to North Carolina UNAC policyholders under the Guaranty Act.

3. UNAC has no interest in the deposit made by it in North Carolina for the sole benefit of North Carolina policyholders except in such sums as remain after the sale of the deposited securities and application of the proceeds for payment of all preinsolvency obligations owed by UNAC to policyholders residing in North Carolina on August 5, 1974.

4. This Court shall retain jurisdiction in order to grant such further supplemental relief based on the declaratory judgment herein rendered, whenever necessary or proper, as by law is provided, and extending to all matters germane to the powers and duties of the Guaranty Association.

5. The Commissioner of Insurance shall promptly proceed to liquidate the deposit made by UNAC for the benefit of North Carolina policyholders and apply the proceeds to meet the pre-rehabilitation obligations owed by UNAC to North Carolina policy-holders.

6. The counterclaim of UNAC against the Guaranty Association requesting damages incurred by reason of frivolous and improper acts of the Guaranty Association in commencing this action is hereby dismissed.

The crux of UNAC argument is that any claim against it, or its assets were compromised during rehabilitation in the Indiana Court and the judgment discharging the company's liability for all claims which the court did not allow is *res judicata* and entitled to full faith and credit as required by the United States Constitution. The authorities cited by UNAC support the proposition that pre-rehabilitation contractual rights that were modified pursuant to a plan of rehabilitation cannot be enforced by resorting to the general assets of the rehabilitated insurance company.

The Guaranty Association contends that the rights of North Carolina policyholders and, through subrogation, the Guaranty Association are not contractual rights and that their claims are statutory rights. They argue that these statutory rights are based upon the laws of North Carolina dealing with deposits made by non-domestic insurance companies for the protection of North Carolina policyholders.

The Guaranty Association is an organization created by statute to which all life, accident and health insurers doing business in North Carolina are required to belong. When an insurance company doing business in North Carolina becomes insolvent, it is the Guaranty Association's duty to see to it that all contractual obligations owed to North Carolina policyholders are fulfilled. Absent the availability of deposits or assets that can be used to meet the contractual obligations of the insolvent insurer, the Guaranty Association must assess its member companies and use those assessments to fulfill the contractual obligations of the insolvent insurer.

G.S. 58-155.66 in describing the purpose of the Guaranty Act states: "To provide this protection, (i) an association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages...." G.S. 58-155.68, in addressing the construction to be given the Guaranty Act, states: "This article shall be liberally construed to effect the purpose under G.S. 58-155.66 which shall constitute an aid and guide to interpretation." Section 58-155.72(9)(a) of the Guaranty Act specifically contemplates payments by the Guaranty Association for payments of contractual obligations or continuation of coverage and states that the Guaranty Association shall be subrogated to rights against the assets of any impaired insurer for such payments.

The Guaranty Association seeks a judgment declaring the Guaranty Association's right to have UNAC's deposit applied to meet UNAC's obligations to North Carolina policyholders and excluding UNAC from any interest in the deposit except as to any interest that might remain after the deposit is applied to payment of the contractual obligations of UNAC to residents of North Carolina.

> G.S. 58-155.69(6) defines "impaired insurer" as:
>
> an insurer which after the effective date of this Article, becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction...

Thus, despite the fact that UNAC has been rehabilitated, it is an impaired insurer and its defaulted obligations continue to exist for purposes of the Guaranty Act.

G.S. 58-155.78(c) provides that the Guaranty Association is deemed a creditor of the impaired insurer to the extent of assets of the impaired insurer attributable to covered policies, reduced by any amount to which the Guaranty Association is entitled by subrogation.

The Guaranty Association acknowledged its statutory liability to North Carolina UNAC's policyholders with regard to the increase in guaranteed premiums and the default on the return of premium riders allowed by the Rehabilitation Order.

It is undisputed that the deposit made by UNAC is located in North Carolina and is held in trust. It is the manifest intention of the North Carolina Legislature that the *title* and *rights* to securities deposited in accord with Article 20, Chapter 58-188.5 *et seq.* are vested in the Commissioner of Insurance, the Treasurer and the State. Continental Bank and Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956). The Indiana Court did not have the necessary personal jurisdiction over the Commissioner of Insurance and the Treasurer. Since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding. Thus, neither the trust property nor the Commissioner and Treasurer were subject to the judicial jurisdiction of the Court in Indiana. Because the Indiana court lacked jurisdiction of the subject matter and in personam jurisdiction to determine the statutory rights of the North Carolina policyholders in the deposit made by UNAC, the Indiana Court's decision is not entitled to full faith and credit in North Carolina and is not protected by the doctrine of *res judicata.*

The Guaranty Association will ultimately be required to pay the policyholders pursuant to its statutory liability. Once paid, the Guaranty Association will become subrogated to any rights of these policyholders in the deposit under G.S. 58-155.72 (9)(a). Consequently, it may assert those rights at this time in a declaratory action.

Having thus determined that the North Carolina policyholders are protected by the special deposit made by UNAC and also by the statutory liability of the Guaranty Association, we hold that it is proper that the deposit of the

defaulting company should first be applied to the loss to the policyholders rather than the Guaranty Association whose members will ultimately be required to pay the remaining claims of the policyholders pursuant to their statutory liability.

In light of Guaranty Association's assumption of liability with regard to UNAC defaults, it had clearly defined rights in the deposits made by UNAC by its statutory subrogation rights. G.S. 58-155.72(9). It seeks no more than it and the North Carolina policyholders are entitled to under the North Carolina Statutes. The Court declared those rights and in its decision we find no error.

No error.

Judges CLARK and ERWIN concur.

APPENDIX C

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION 78 CVS 174

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION,	)	
Plaintiff	)	
v.	)	ORDER
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, and HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,	)	
Defendants.	)	

THIS CAUSE coming to be heard and having been heard before James H. Pou Bailey, Judge Presiding, at the March 19, 1979, Non-jury Civil Session of the Wake County Superior Court on the motions for summary judgment of the Plaintiff, North Carolina Life and Accident and Health Insurance Guaranty Association ("Guaranty Association"), and on the motions for summary judgment of the Defendants, Underwriters National Assurance Company ("UNAC"), John Randolph Ingram, Commissioner of Insurance of the State of North Carolina ("Commissioner of Insurance"), and Harlan E. Boyles, Treasurer of the State of North Carolina ("Treasurer"); and the Court at the hearing of the motions, by examining the pleadings and the

evidence before it, and by examining the briefs submitted by the parties, and by interrogating counsel, having ascertained what material facts exist without substantial controversy, hereupon makes this order specifying the facts that appear to be without substantial controversy and setting forth the requisite conclusions of law as follows:

SPECIFIED FACTS WITHOUT SUBSTANTIAL CONTROVERSY

1. Prior to August 5, 1974, Underwriters National Assurance Company ("UNAC"), an insurance company organized under the laws of Indiana, transacted the business of insurance in North Carolina.

2. As a result of the questionable financial condition of UNAC, George E. King, then Deputy Commissioner and Chief Examiner of the North Carolina Department of Insurance, by letter dated June 13, 1973, informed Ralph K. Lindop, then President and Chairman of the Board of UNAC, that a $100,000 deposit for the protection of North Carolina policyholders would be required by the North Carolina Department of Insurance ("Department of Insurance") as a condition to allowing UNAC to do business in North Carolina. By letter dated June 18, 1973, from Mr. Lindop to Mr. King, UNAC stated that it was taking the necessary steps to have $100,000 in securities transferred to the North Carolina Department of Insurance to be held in trust for "the sole benefit of North Carolina policyholders." By letter to George E. King dated June 19, 1973, and attachments thereto, Mr. Bruce Bowers, then Vice President and Treasurer of UNAC, described the manner in which the securities were to be transferred to, and registered in the name of, the Commissioner of Insurance, UNAC made the required $100,000 deposit, which was registered as follows:

> Treasurer of the State of North Carolina in trust for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina General Statutes.

That deposit continues to be held by the Commissioner of Insurance.

3. On August 5, 1974, in response to a petition for rehabilitation by the Indiana Department of Insurance, the Marion County Superior Court ordered the Department of Insurance of the State of Indiana to take possession of the business and assets of UNAC and to conduct UNAC's business and appoint the personnel necessary to rehabilitate UNAC.

4. On August 6, 1974, the Commissioner of Insurance notified the Guaranty Association of the impairment of UNAC pursuant to Section 58-155.75 of the North Carolina Life and Accident and Health Insurance Guaranty Association Act ("Guaranty Act").

5. The Guaranty Association, along with the guaranty associations in seven other states, obtained single counsel in Indiana and, pursuant to a joint motion dated June 8, 1976, intervened in the Indiana rehabilitation proceeding involving UNAC. As a result of that intervention, the proposed plan of rehabilitation for UNAC was altered so that UNAC would have certain contingent liabilities to the guaranty associations.

6. Neither the Commissioner of Insurance nor the Treasurer appeared in the Indiana rehabilitation proceeding involving UNAC. No North Carolina policyholder appeared in the rehabilitation proceeding involving UNAC. Nor did any policyholder from a state other than North Carolina who is protected by a deposit, such as the deposit made in North Carolina, appear in the Indiana insolvency proceeding involving UNAC.

7. By order dated November 22, 1976, the Honorable Michael T. Doogan, II, Judge, Marion County Superior Court, approved a plan of rehabilitation and settlement of claims and litigation in the UNAC insolvency proceeding. Pursuant to the order of rehabilitation, UNAC was allowed to increase guaranteed premiums on certain noncancellable disability insurance policies by as much as 350 percent. The order of rehabilitation also cancelled obligations owed by UNAC pursuant to a Return of Premium Rider under which UNAC was obligated to refund 80 percent of the premiums paid by policyholders during a 10-year period if, during that period, the policyholders' claims under the policy equalled less than 20 percent of the total premiums paid. Pursuant to the order of rehabilitation, the policyholders having Return of Premium Riders were entitled to receive 15.68 percent of the amount paid for the Return of Premium Rider up to August 4, 1974, plus the full amount paid for the Return of Premium Rider after August 5, 1974.

8. The Guaranty Association is an organization created by statute in which all life, accident and health insurers doing business in North Carolina are required to belong. When an insurance company doing business in North Carolina becomes involvent, it is the Guaranty Association's duty to see to it that all contractual obligations owed to North Carolina policyholders are fulfilled. Absent the availability of deposits or assets that can be used to meet the contractual obligations of the insolvent insurer, the Guaranty Association must assess its member companies and use those assessments to fulfill the contractual obligations of the insolvent insurer. The Guaranty Association acknowledges its statutory liability to at least 26 UNAC policyholders with regard to the increase in guaranteed premiums and the default on the Return of Premium Riders allowed by the Order of Rehabilitation. The anticipated liability of the Guaranty Association may exceed $100,000.

9. As a result of its liability under the Guaranty Act, the Guaranty Association entered into a Service Contract with UNAC dated October 13, 1977. Pursuant to that contract, the Guaranty Association agreed to pay the increased premiums that were allowed under the order of rehabilitation on policies with guaranteed premiums and also to pay any liability under the Return of Premium Riders. Paragraph 12 of the Service Contract reads, in part, as follows:

> It is expressly agreed, however, that the Guaranty Association and UNAC explicitly reserve all their rights and remedies in connection with any deposits made by UNAC with the Commissioner of Insurance of North Carolina, including deposits understood to total $100,000, which rights and remedies are governed by North Carolina law.

In a letter dated December 5, 1977, from David Phipps, President of UNAC, to Marion J. David, Chairman of the Guaranty Association, UNAC took the position that the abovequoted portion of Paragraph 12 of the Service Contract pertained only to whatever rights existed after the implementation of the plan and that no rights existed at that point.

10. Neither the deposit made by UNAC in North Carolina, nor the special legal rights of North Carolina policyholders in that deposit were specifically considered by the Indiana Court in the rehabilitation order dated November 22, 1976.

11. By complaint filed on January 12, 1978, the Guaranty Association commenced this declaratory judgment action in the Superior Court of Wake County, North Carolina, against UNAC, the Insurance Commissioner and the Treasurer of the State of North Carolina. In this action, the Guaranty Association requests a judgment declaring the Guaranty Association's right to

have UNAC's deposit applied to meet UNAC's obligations to North Carolina policyholders and excluding UNAC from any interest in the deposit except as to any interest that might remain after the deposit is applied to payment of the contractual obligations of UNAC to residents of North Carolina.

12. The answer of the Commissioner of Insurance and the Treasurer in this action admitted the pertinent allegations contained in the complaint filed by the Guaranty Association. Additionally, the Commissioner of Insurance and Treasurer filed a crossclaim and counterclaim requesting that the Court enter a judgment declaring their powers, rights, duties and responsibilities with respect to the deposit made by UNAC. The crossclaim and counterclaim also requested that, should this Court find that the deposit should be liquidated for the benefit of the Plaintiff and North Carolina policyholders, that the Commissioner of Insurance be appointed liquidator.

13. On July 13, 1978, UNAC filed a Petition for Instructions in the Superior Court of Marion County, Indiana. The Petition for Instructions asserted that the Guaranty Association was in breach of the Service Contract and in violation of the Court's final order, the plan of rehabilitation and other orders of the Court in filing the declaratory judgment action in North Carolina. The Petition for Instructions asked whether, in light of the alleged breach of contract and violation of the Court's orders, UNAC should be required to pay the money owed by it under the Service Contract to the Guaranty Association.

14. By order dated November 22, 1978, the Indiana Superior Court in Marion County held, as a conclusion of law, that the order of rehabilitation dated November 22, 1976, adjudicated and dismissed all claims, including the statutory rights of North Carolina policyholders in the special deposit made by UNAC with the Commissioner of

Insurance. The conclusions of law in that order also stated that the above-quoted portion of Paragraph 12 of the Service Contract was invalid and that the declaratory judgment action brought in North Carolina was in violation of orders of the rehabilitation court. The November 22, 1978, order directed UNAC to withhold the payment of any monies due under the Service Contract in North Carolina until after resolution of the North Carolina suit and to take appropriate action to defend the suit in North Carolina. The Indiana Court's November 22, 1978, order has been appealed to the Indiana Court of Appeals.

CONCLUSIONS OF LAW

1. Under Article 17A and Article 20, Chapter 58, General Statutes of North Carolina, §§ G.S. 58-155.14, 58-155.15, 58-184, and 58-185 and under the applicable case law, only this Court has the requisite subject matter jurisdiction to determine the rights of North Carolina policyholders in the special deposits made by UNAC for their protection.

2. The Indiana insolvency proceeding involving UNAC lacked the necessary in personam jurisdiction over the Commissioner of Insurance and the Treasurer of the State of North Carolina to adjudicate the rights in the deposit made by UNAC in North Carolina. The Indiana insolvency proceeding also lacked the necessary in personam jurisdiction over North Carolina policyholders of UNAC since neither a North Carolina policyholder nor a similarly situated policyholder appeared before the Indiana Court.

3. An appearance in the Indiana insolvency proceeding by any of the parties having an interest in the deposit made by UNAC in North Carolina could not constitute a waiver of the Indiana Court's lack of subject matter jurisdiction with regard to the deposit.

4. The Indiana Court's determination that the North Carolina deposit was an asset included in the Indiana insolvency proceeding and that any claim against the

deposit was dismissed by the Indiana Court's final order and the plan of rehabilitation is contrary to the applicable law regarding rights in deposits made by foreign insolvent insurance companies as established under Article 17A and Article 20 of the General Statutes of North Carolina and the court decisions pertaining to such deposits.

5. The Indiana Court's abrogation of the statutory rights in special deposits of North Carolina policyholders is in violation of the Full Faith and Credit provision of the United States Constitution.

6. Because the Indiana Court lacked the requisite subject matter jurisdiction and in personam jurisdiction to determine the rights of North Carolina policyholders in the deposit made by UNAC in North Carolina, the Indiana Court's decision is not entitled to Full Faith and Credit in North Carolina and is not protected by the legal doctrine of *res judicata.*

7. The Guaranty Association has stated a claim upon which relief can be granted under the Declaratory Judgment Act, G.S. §§ 1-253, *et seq.*, and under the Guaranty Act, G.S. § 58-155.72(8).

8. The statute of limitations does not bar the rights of North Carolina policyholders of UNAC and the Guaranty Association to have the deposit made by UNAC liquidated and used to meet the pre-rehabilitation obligations owed by UNAC.

9. The North Carolina policyholders of UNAC and the Guaranty Association are entitled to have the deposit made for the protection of North Carolina policyholders by UNAC liquidated and used to meet the pre-rehabilitation obligations owed by UNAC.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The UNAC policyholders residing in North Carolina on August 5, 1974, are entitled to have the deposit made by UNAC for the sole protection of North Carolina policyholders liquidated and to have the proceeds applied to meet the pre-rehabilitation obligations owed to them by UNAC to the extent those obligations were defaulted upon as a result of the insolvency of UNAC and the subsequent rehabilitation proceeding in Indiana.

2. To the extent that the proceeds of the deposit made by UNAC for the sole benefit of North Carolina policyholders fulfill the contractual obligations owed by UNAC to North Carolina policyholders, the Guaranty Association is not liable to North Carolina UNAC policyholders under the Guaranty Act.

3. UNAC has no interest in the deposit made by it in North Carolina for the sole benefit of North Carolina policyholders except in such sums as remain after the sale of the deposited securities and application of the proceeds for payment of all pre-insolvency obligations owed by UNAC to policyholders residing in North Carolina on August 5, 1974.

4. This Court shall retain jurisdiction in order to grant such further, supplemental relief based on the declaratory judgment herein rendered, whenever necessary or proper, as by law is provided, and extending to all matters germane to the powers and duties of the Guaranty Association.

5. The Commissioner of Insurance shall promptly proceed to liquidate the deposit made by UNAC for the benefit of North Carolina policyholders and apply the proceeds to meet the pre-rehabilitation obligations owed by UNAC to North Carolina policyholders.

6. The counterclaim of UNAC against the Guaranty Association requesting damages incurred by reason of frivolous and improper acts of the Guaranty Association in commencing this action is hereby dismissed.

This *11th* day of *April*, 1979.

s/ James H. Pou Bailey

James H. Pou Bailey
Judge Presiding

APPENDIX D

STATE OF INDIANA)		IN THE SUPERIOR
)	SS:	COURT OF MARION
COUNTY OF MARION)		COUNTY
		ROOM NO. 5
DEPARTMENT OF INSURANCE,)		
STATE OF INDIANA,)		
)		
Petitioner,)		
)		
v.)		CAUSE NO.
)		S574-851
UNDERWRITERS NATIONAL)		
ASSURANCE COMPANY,)		
)		
Respondent.)		

ORDER

On July 13, 1978, Underwriters National Assurance Company ("Underwriters") filed a Petition for Instructions with the Court ("Petition"). Part III of the Petition deals with the impact of the lawsuit filed against Underwriters by the North Carolina Life and Accident and Health Insurance Guaranty Association ("North Carolina Association") upon the obligations of Underwriters and of the North Carolina Association under the Court-approved Service Contract between Underwriters and the North Carolina Association and under the orders of the Court. Underwriters asked the Court, pursuant to paragraph (10) of the Court's final Order, dated November 22, 1976, to determine whether or not Underwriters should pay monies under the Service Contract to the North Carolina Association and, in accordance with that determination, direct appropriate action by Underwriters in accordance with the Court's final Order and the Plan of Rehabilitation ("Plan"), and the other orders of the Court.

Pursuant to an Order Setting Hearing, dated August 30, 1978, the Court on September 20, 1978, received a Stipulation of Fact and heard oral argument by Indianapolis counsel for Underwriters and by Indianapolis and North Carolina counsel for the North Carolina Association on Part III of the Petition. The Court has also received briefs from the North Carolina Association and from Underwriters. No other party appeared at the hearing and no other party has presented any matter to the Court concerning Part III of the Petition.

Having considered the matters set out in the Petition, the evidence and arguments presented by the parties, and the record herein, the Court makes the following Findings of Fact and Conclusions of Law and issues the following Order:

FINDINGS OF FACT

1. The North Carolina Association has been a named party to this rehabilitation proceeding since June 8, 1976, when it filed a Motion to Intervene. It has been represented by counsel herein.

2. Part X (C) of the Plan, as adopted by the final Order of the Court, says:

> "On August 4, 1974, UNAC was licensed to do business in states which either had at that time or have subsequently enacted legislation providing for some form of life and/or health insurance guaranty association. While the legislation in each state differs particularly as to its applicability, the general purpose of such legislation is to protect the state's policyowners, subject to certain limitations, against failure in performance of contractual obligations due to the impairment of the insurer. To provide that protection, an association of insurers is created to ensure the payment of policy benefits and of

continuation of coverages, and members of the association are subject to assessment to provide funds to carry out that purpose.

"The Rehabilitator understands that the guaranty associations in the eight states of Connecticut, Kansas, Montana, Nevada, New Hampshire, North Carolina, South Carolina and Vermont may have certain obligations to UNAC policyowners residing in their respective states on August 5, 1974. To the extent that any guaranty association, as a result of the rehabilitation proceeding, makes a payment to or on behalf of a UNAC policyowner, that policyowner's rights under the UNAC policy shall be deemed to be assigned to the guaranty association until such time as the guaranty association has been fully reimbursed. UNAC shall have no further obligation or liability to any guaranty association, other than the obligation to recognize as valid the assignment of the policyowner's rights to the guaranty association and to treat the guaranty association as it would have treated the policyowner; *provided, however,* if any guaranty association makes any payment to or on behalf of any policyowner which is not fully reimbursed pursuant to the foregoing provisions, that association shall receive from UNAC each year until fully reimbursed a portion of UNAC's statutory net gain from operations after dividends to policyowners, federal income taxes and the payments to be made under Part XI, equal to the annual premium in force for basic coverage in the state of that association on August 5, 1974, divided by the total annual premiums in force for UNAC basic coverage on August 5, 1974."

Paragraph (3) of the final Order says:

> "To the extent that any claim, objection or proposal which was or could have been presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied. Without limiting the generality of the preceding sentence, all claims or litigation by any past or present UNAC policyowners, UNAC International Corporation, UNAC agents, brokers or managers, UNAC officers and directors, UNAC creditors, and shareholders of UNAC International Corporation against UNAC or the Rehabilitator, except as provided in the Plan, are hereby compromised, settled and dismissed."

3. By the Court's Order of June 14, 1977, Underwriters and each of the guaranty associations were authorized and directed to execute a Service Contract in substantially the form attached to a joint petition filed by Underwriters and the guaranty associations on June 8, 1977, and to do all acts reasonably necessary or appropriate to implement and carry out the Service Contract. Underwriters states in the Petition that it has executed identical Service Contracts (in a form identical to that attached to the joint petition) with the guaranty associations in Connecticut, Kansas, Nevada, New Hampshire, and South Carolina and has tendered for execution identical Service Contracts with the guaranty associations in Montana and Vermont.

4. A copy of the Service Contract between Underwriters and the North Carolina Association was attached to the Petition as Exhibit A and is in evidence as Stipulation Exhibit A. That Service Contract is identical to all other Service Contracts between Underwriters and the guaranty associations, with the exception of the insertion

by the North Carolina Association of the last paragraph of the Service Contract on page 8. That insertion was not authorized by the Court, either when the form Service Contract was approved in the Order of June 14, 1977, or any other time.

5. When delivering to the North Carolina Association by mail the executed Service Contract, with the inserted paragraph, Underwriters advised the North Carolina Association by letter dated December 5, 1977, that it was Underwriters' understanding that the inserted paragraph on the last page was designed simply to recite that neither Underwriters nor the North Carolina Association was waiving any claims that it may have in connection with North Carolina deposits and that it was Underwriters' position that the North Carolina Association had no claim to the deposits because of the contrary provisions of the Plan. Underwriters asked the North Carolina Association to advise Underwriters if the North Carolina Association had any different view. Underwriters also advised the North Carolina Association in that letter that it was Underwriters' understanding that the last paragraph was inserted by the North Carolina Association simply to preserve whatever rights it may have had after implementation of the Plan and that Underwriters was executing the Service Contract with that understanding. The December 5, 1977, letter from Underwriters to the North Carolina Association is in evidence as Stipulation Exhibit F. While there is no direct evidence in the record as to when the Service Contract, as changed by the North Carolina Association, was signed by the respective parties, the reasonable inferences to be drawn from the exhibits in the record indicate that the North Carolina Association signed on or about October 13, 1977 (the typed date appearing on the first page of the Service Contract), but that Underwriters did not sign until on or shortly before December 5, 1977.

6. On January 12, 1978, the North Carolina Association sued Underwriters in a North Carolina state court seeking to obtain the benefit of deposits made by Underwriters in 1973 in North Carolina totalling $100,000 ("North Carolina deposit"). Letters to and from Underwriters and the Department of Insurance of the State of North Carolina in 1973 are in evidence as Stipulation Exhibits G, H and I. Underwriters has defended the lawsuit by answering the North Carolina Association's complaint and filing a counterclaim against the North Carolina Association. A copy of Underwriters' answer and counterclaim was attached to the Petition as Exhibit C and is in evidence as Stipulation Exhibit C. The Commissioner of Insurance and the Treasurer of the State of North Carolina, co-defendants in the lawsuit, have filed a cross-claim against Underwriters, a copy of which was attached to the Petition as Exhibit D and is in evidence as Stipulation Exhibit D. Underwriters has filed an answer thereto, a copy of which was attached to the Petition as Exhibit E and is in evidence as Stipulation Exhibit E.

7. Neither prior to the issuance on November 22, 1976, of the Court's final Order adopting the Plan, nor even prior to the Court's orders of April 20, 1977, and June 14, 1977, concerning the Service Contract, did the North Carolina Association make any claim to (or state any objection to any orders of the Court based upon) the North Carolina deposit. Part V of the Plan, which was distributed to all policyowners and other interested persons, included the North Carolina deposit in the general assets of Underwriters for the purpose of rehabilitating Underwriters for the benefit of all policyowners everywhere. The North Carolina Association raised no objection to the inclusion of the North Carolina deposit as a general asset of Underwriters and made no contention that these assets in any manner constituted a separate fund for its benefit, or for the benefit of the policyowners in North Carolina.

8. Underwriters states in the Petition that it is ready to mail to the North Carolina Association, pursuant to the terms of the Service Contract, certain monies which the Service Contract provides are to be remitted quarterly. Were it not for the North Carolina Association's filing of a lawsuit against Underwriters asserting a claim to the North Carolina deposit, Underwriters states in the Petition that certain monies will be remitted to the North Carolina Association. However, Underwriters contends it should not remit monies to the North Carolina Association if, as Underwriters contends, the Association's filing of the lawsuit constitutes a breach of the Service Contract or a violation of the Court's final Order, the Plan, or other orders of this Court. Underwriters has been forced to employ attorneys in North Carolina and has incurred other additional legal expense as a result of the North Carolina Association's actions. Underwriters should withhold funds from the North Carolina Association to compensate it for these expenses, pending final resolution of the North Carolina lawsuit.

9. Since the adoption of the Plan, Underwriters has complied with the terms of its policies as modified by the Plan, and has not defaulted in any obligation to any North Carolina policyowners.

10. On July 13, 1978, Underwriters mailed a copy of the Petition to each of the attorneys listed on the Schedule of Attorneys for Service of Papers, a copy of which was attached to the Petition as Exhibit F, and to the Indiana Department of Insurance. Underwriters also mailed copies to the North Carolina attorneys for the North Carolina Association and for the Commissioner of Insurance and the Treasurer of the State of North Carolina. The Court's Order Setting Hearing, dated August 30, 1978, was mailed to the same persons. Said mailings constitute reasonably adequate notice to interested parties of the contents of the Petition and of the hearing on September 20, 1978.

CONCLUSIONS OF LAW

1. The Court includes in its Conclusions of Law any finding of fact above which is a conclusion of law.

2. The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.

3. The insertion by the North Carolina Association of the last paragraph on page 8 of the Service Contract was not authorized by the Court and is a violation of the Court's Order of June 14, 1977. Any attempt by the North Carolina Association or any other person to circumvent the provisions of the final Order, the Plan, or other orders of the Court, or to obtain any preference or special right in the assets of Underwriters, as fully adjudicated by the final Order and the Plan, is a violation of the orders of this Court to be dealt with by the Court.

4. The claims asserted in the North Carolina lawsuit commenced by the North Carolina Association against Underwriters would result in a violation of the orders of this Court. While the Court, pursuant to Ind. Code §§ 27-1-4-2 and 27-1-4-9 and the continuing jurisdiction retained by the Court pursuant to the final Order and the Plan, may have the power to enjoin the North Carolina Assocation from proceeding in the North Carolina state court against Underwriters on issues determined in the rehabilitation proceeding (to which both Underwriters and the North Carolina Association were parties), the Court has no reason to believe that the North Carolina state court will not, as a matter of comity and full faith and credit, recognize as binding the prior determinations of this Court. Underwriters has not applied for injunctive relief and an injunction will not be issued against the North Carolina Association at this time.

APPENDIX E

ORDER

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. Underwriters shall withhold the payment of any monies under the Service Contract to the North Carolina Association until further order of the Court after a resolution of the lawsuit filed by the North Carolina Association and a report to the Court as to said resolution by Underwriters and the North Carolina Association.

2. Underwriters is directed to take all appropriate action to resist application of the North Carolina deposit to reimburse the North Carolina Association or any North Carolina policyowners for claims that were compromised and settled by the Plan. Claims arising from defaults by Underwriters in its obligation to North Carolina policyowners under policies as revised pursuant to the Plan, are not affected by this Order.

3. The Court reserves judgment on any questions concerning possible additional action that should be taken concerning the provisions of the Service Contract, pending further discussions between Underwriters and the North Carolina Association, and a petition for instructions by Underwriters or the North Carolina Association if either believes said additional action should be considered by the Court.

Dated: 11-22-78

s/ Michael T. Dugan, II

Judge, Superior Court of Marion County, Room No. 5

Copies to:
All Counsel of Record
Indiana Department of Insurance
Arch T. Allen, III
Rufus L. Edmiston
Isham B. Hudson, Jr.

STATE STATUTES INVOLVED

Indiana Insurance Law

Ind. Code § 27-1-4-1:

Rehabilitation of domestic companies—Grounds. In addition to any and all other powers conferred by this act [27-1-2-1—27-1-2-32], the department is hereby authorized, under judicial order as hereinafter provided, to take possession of the business and property of any domestic insurance company to which this act is applicable, for the purpose of rehabilitation, upon any one or more of the following grounds: That such insurer,

(a) is insolvent or in imminent danger of insolvency; or

(b) has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the department; or

(c) has neglected or refused to observe an order of the department to make good any deficiency, whenever its capital, if it be a stock corporation, or its surplus fund, if it be a mutual corporation, shall have become impaired; or

(d) has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other insurance company, without having first obtained the written approval of the department; or

(e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or

(f) has wilfully violated its charter or any law of the state; or

(g) has an officer who has refused to be examined under oath, touching its affairs; or

(h) has ceased to transact the business of insurance for a period of one [1] year; or

(i) has commenced or attempts to commence or prosecute any action or proceeding to procure the appointment of a receiver, custodian or sequestrator under any law except this article [27-1-4-1—27-1-4-30]; or

(j) has been the subject of an application for the appointment of a receiver, custodian or sequestrator of the insurance company or its property, or if a receiver, custodian or sequestrator, is appointed by a federal court or such appointment is imminent; or

(k) has consented to such an application through a majority of its directors, stockholders or members; or

(l) has not organized and obtained a certificate authorizing it to commence the transaction of its business within one [1] year from the date of its incorporation as provided for in section 77 [27-1-6-18] of this act [Acts 1935, ch. 162, § 29, p. 588.]

Ind. Code § 27-1-4-2:

Order of rehabilitation—Termination. (a) An order to rehabilitate a domestic insurance company shall direct the department to take possession of the property of such insurance company and to conduct the business thereof and/or to take such steps toward the removal of the causes and conditions which have made such proceeding necessary as the court shall direct.

(b) At any time the department shall deem that further efforts to rehabilitate such insurance company would be futile, it may apply to the court under this article [27-1-4-1—27-1-4-30] for an order of liquidation.

(c) The department, or any interested person, upon due notice to the department, at any time, may apply for an order terminating this proceeding and permitting such

insurance company to resume possession of its property and the conduct of its business, but, no such order shall be granted except when, after a full hearing, the court shall determine that the purposes of the rehabilitation proceeding have been accomplished. [Acts 1935, ch. 162, § 30, p. 588.]

Ind. Code § 27-1-4-9:

Injunctions.— (a) Upon an application by the department for an order to show cause under this article [27-1-4-1—27-1-4-30], or at any time thereafter, the court before whom such order is returnable may issue an injunction restraining the insurance company named in the order, its officers, directors, stockholders, members, trustees, agents, servants, employees and/or all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

(b) Such court may at any time during a proceeding under this article issue such other injunctions or orders as may be deemed necessary to prevent interference with the department or the proceeding, or waste of the assets of the insurance company, or the prosecution of any actions, or the obtaining of any preferences, judgments, attachments or other liens, or the making of any levy against the insurance company or against the assets or any part thereof. [Acts 1935, ch. 162, § 37, p. 588.]

Ind. Code § 27-1-4-10:

Right to liquidate.—Except as herein otherwise provided, the sole and exclusive right to terminate and liquidate the affairs of any insurance company to which this act [27-1-2-1—27-1-20-32] is applicable, shall be vested in the department, and hereafter no receiver, assignee, trustee or liquidating agent shall be appointed for such purpose or for any insurance company or the assets or

property thereof by any court, or the judge thereof or any other person. After the department shall have taken possession of the business and property of any insurance company, as herein provided, no suit, action or other proceeding at law or in equity shall be commenced or proceeding had against such insurance company upon any debt, obligation, claim or demand, but all debts, claims and demands of every kind and character against such insurance company shall be filed with the department and shall be determined and disposed of as provided in this act. No person, firm or corporation holding any of the property or claims of any such insurance company shall have any lien or charge against such property or credits for any payment, advance or clearance made after receiving notice of the fact that the department has taken possession and no lien shall attach to any of the assets or property of such insurance company by reason of the entry of any judgment recovered against such insurance company after the department shall have taken possession of its business and property and while such possession continues. [Acts 1935, ch. 162, § 38, p. 588.]

North Carolina Insurance Law

N.C. Gen. Stat. § *58-155.69(6):*

Definitions.—As used in this Article:

* * *

(6) "Impaired insurer" means (i) an insurer which after the effective date of this Article, becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction, or (ii) an insurer deemed by the Commissioner after the effective date of this Article to be unable or potentially unable to fulfill its contractual obligations.